No. 08-804

Supreme Court, U.S.
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In The Supreme Court of the United States

LOU ANNE LAVENDER PERKINS,
Petitioner,

v.

DCC LITIGATION FACILITY, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF

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REPLY

Pursuant to Sup. Ct. R. 15, Petitioner files this Reply to Respondent's Brief In Opposition as follows:

A. Respondent fails to address the "Question Presented."

Respondent's attempt to restate the question presented for this Court's review is improper under Sup. Ct. R. 14(1)(a). Respondent's "Question Presented" is argumentative and fails to comply with the rule's prescription that the question be short and presented without unnecessary detail. Regardless, Respondent's "Question Presented" is irrelevant as "only the questions set out in the petition, or fairly included therein, will be considered by the Court."

B. The potential impact of the Court's review is a compelling reason to grant the petition.

Respondent's Brief In Opposition demonstrates precisely why this Court should grant the petition. On one hand, Respondent contends that Petitioner has failed to identify compelling reasons for the granting of the petition, while at the same time Respondent acknowledges that review of the Sixth Circuit's decision would impact "thousands" of individuals. *See* Brief In Opposition at 19, 22. The undeniable fact that this Court's review of the Sixth Circuit's decision would impact the legal rights of such a large number of individuals is in itself a compelling reason to grant the petition.

C. Permitting Petitioner to opt out after the deadline would not create an exception that would swallow the rule.

Respondent's contention that "if the Court granted Perkins [sic] motion, it would have no reason to refuse any other untimely opt-out" fails to acknowledge the undisputed fact that Petition made good-faith efforts to comply with her obligation to keep the Settlement Facility informed of her current contact information. *See* Brief In Opposition at 20. Petitioner is only requesting that this Court grant the petition to determine whether an individual who has made good faith attempts to comply with his or her obligations under an opt-out plan, but who nevertheless has failed to receive notice of the opt-out deadline, should be permitted to opt out after the expiration of the deadline. By no means does the question presented constitute the exception that would swallow the rule.

D. The undisputed facts

The material facts are not in dispute. Respondent does not dispute that Petitioner did not receive notice of the opt-out deadline until after the deadline had passed. Respondent does not dispute that Petitioner sent her updated and current contact information via email to info@tortcomm.org prior to the opt-out deadline. Instead, Respondent contends that Petitioner's email to info@tortcomm.org was never sent to the Settlement Facility, and that therefore she failed to comply with her responsibility to provide correct addresses in regard to further proceedings in the Settlement Facility. *See* Brief In Opposition at 13. Notably, Respondent does not dispute that Petitioner would be permitted to opt out

after the deadline if she had provided her correct address to the Settlement Facility.

On September 10, 2003, over a year prior to the November 29, 2004 opt-out deadline, Petitioner sent an info@tortcomm.org updating her information, name, current address, diagnosis and requesting assistance and help. Respondent does not dispute Petitioner's contention that her understanding at the time was that the email would go to the Dow Corning Tort Committee, otherwise known as The Tort Claimants' Committee, a committee appointed to represent the interests of all tort claimants during the bankruptcy phase of the case against Dow Corning. The Tort Claimants' Committee ceased to function as an official committee when the Amended Joint Plan of Reorganization for Dow Corning Corporation became effective on June 1, 2004. On June 1, 2004, the Amended Joint Plan of Reorganization (the "The Plan") became effective and created a court-appointed committee named the Claimants' Advisory Committee, which was appointed to represent the general interests of all tort claimants in the settlement. Significantly, Claimant's Advisory Committee used the very same email address as the Tort Claimants' Committee, info@tortcomm.org. Notably, this same email address still appears on the website of the Claimants' Advisory Committee today, the very same way as it did when the committee was the Tort Claimants' Committee. *See* <http://www.tortcomm.org/>.

Statements on the Claimants' Advisory Committee website include the following:

- "The Tort Claimants' Committee ceased to function as an official committee when the Plan of Reorganization for Dow Corning corporation became effective on June 1, 2004. The Plan Documents provide that a new committee – called the Claimants' Advisory Committee or CAC – will be appointed to represent the general interests of tort claimants. The United States District Court issued an Order and Notice of Appointment of the Claimants' Advisory Committee on May 20, 2004. The CAC will continue to maintain this website and provide information to tort claimants and counsel."

- "All inquiries to the Claimants' Advisory Committee should be directed to the following email address: info@tortcomm.org".

- "Under 'Latest News' - Welcome to the new Claimants' Advisory Committee (CAC) website! We have redesigned the former Tort Claimants' Committee website to provide you with current information concerning the settlement and litigation options in the Settlement Facility-Dow Corning Trust (SF-DCT).

- "If you need legal assistance with your claim, you can contact the Claimants'

Advisory Committee at info@tortcomm.org."

- Inquiries about the Settlement Option and Litigation Option may be directed to the Claimants' Advisory Committee at: info@tortcomm.org.

E. The Sixth Circuit failed to apply this Court's test for excusable neglect.

This Court has stated that the determination of whether a party's neglect of a deadline is excusable is an equitable one, taking account of all relevant circumstances surrounding the party's lapse. *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489 (1993). "These include ... the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.*

Respondent relies entirely on the "floodgates" argument to show putative prejudice resulting from Petitioner's being permitted to opt-out of the settlement after the deadline. *See* Brief In Opposition at 18. However, as outlined above, the significance of Petitioner's question presented would extend only to those individuals like Petitioner whose failure to timely opt out is the result of excusable neglect.

Moreover, Respondent does not dispute that Petitioner was diligent in moving to opt-out after

discovering that the deadline to do so had passed. Respondent does not even contend that the length of the delay and its potential impact on judicial proceedings weighs against Petitioner's excusable neglect. Instead, Respondent acknowledges that the third factor—the reason for the delay—is the most important factor and then proceeds to mischaracterize the reason for Petitioner's delay in opting out. To clarify, Petitioner does not contend that her reliance on the counsel of her attorneys caused her to fail to timely opt-out. Again, the undisputed fact that Petitioner did not receive notice of the opt-out deadline was the reason for her delay, and the reason she did not receive the notice was that the Settlement Facility did not send it to her correct address despite Petitioner's undisputed good-faith attempts to update her information. Also, the delay was not within Petitioner's reasonable control because she had sent her updated information to the entity she understood to be responsible for maintain records.

As expected, Respondent completely ignores the good faith factor of *Pioneer*, obviously because it weighs in favor in excusable neglect.

Combined with Petitioner's clear and consistent manifestations of her intent to litigate her claims outside of the class, Petitioner's good faith attempts to comply with her responsibility to provide correct addresses in regard to further proceedings in the Settlement Facility demonstrate the Sixth Circuit's error in affirming the District Court's judgment.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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